

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 18, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Garan Services Corp.*  
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Serial No. 90433386  
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G. Roxanne Elings and Christine Sun of Davis Wright Tremaine LLP,  
for Garan Services Corp.

Kevin Flebbe, Trademark Examining Attorney, Law Office 110,  
Chris Pedersen, Managing Attorney.  
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Before Kuhlke, Taylor and Hudis,  
Administrative Trademark Judges.

Opinion by Hudis, Administrative Trademark Judge:

Garan Services Corp. (“Applicant”) seeks registration on the Principal Register of the standard character mark STRIPES for “[e]ntertainment services, namely, providing on-line interactive children’s stories” in International Class 41.<sup>1</sup>

The Trademark Examining Attorney refused registration under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant’s mark, as applied to the services identified in the Application, so resembles the standard character mark

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<sup>1</sup> Application Serial No. 90433386 was filed on December 30, 2020, under Trademark Act Section 1(b), 15 U.S.C. § 1051(b), based upon Applicant’s allegation of a bona fide intention to use the mark in commerce.

STRIPES, registered on the Principal Register for “[p]ublication of books, of magazines, of journals, of newspapers, of periodicals, of catalogs, of brochures; [p]ublication of electronic newspapers accessible via a global computer network,” in International Class 41,<sup>2</sup> as to be likely to cause confusion, mistake, or deception.

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. The appeal is fully briefed.<sup>3</sup> We affirm the refusal to register.

### **I. Evidentiary Issues**

Before proceeding to the merits of the refusal, we address a few evidentiary matters. During the prosecution of the Application that is the subject of this appeal, the Examining Attorney did not make any evidence of record except for a USPTO database record of U.S. Registration No. 3270101 for the STRIPES mark that is the basis for the refusal to register Applicant’s mark.<sup>4</sup> Applicant did not make any evidence of record during prosecution.

Applicant attaches to its appeal brief a copy of the definition of “publication” from the MERRIAM-WEBSTER online dictionary.<sup>5</sup> The Examining Attorney attaches to his

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<sup>2</sup> Registration No. 3270101 was issued on July 24, 2007; renewed.

<sup>3</sup> Applicant’s Appeal Brief may be found in the record at 6 TTABVUE; the Examining Attorney’s Brief at 8 TTABVUE; and Applicant’s Reply Brief at 9 TTABVUE. Page references herein to the application record refer to the online database of the USPTO’s Trademark Status & Document Retrieval (“TSDR”) system. All citations to documents contained in the TSDR database are to the downloadable .pdf versions of the documents in the USPTO TSDR Case Viewer. References to the briefs and the appeal record refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

<sup>4</sup> USPTO database record of U.S. Registration No. 3270101 for the STRIPES mark. Office Action of January 11, 2021 at 5-6.

<sup>5</sup> Definition of “publication” from the MERRIAM-WEBSTER online dictionary. Applicant’s Brief, 6 TTABVUE 14-15, 17.

appeal brief copies of the definitions of “publish” and “magazine” from the MERRIAM-WEBSTER online dictionary.<sup>6</sup> Applicant and the Examining Attorney each request that we take judicial notice of the respective dictionary definitions attached to the briefs. The requests for judicial notice are granted. The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *See In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d* 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

## II. Likelihood of Confusion: Applicable Law and Analysis

We base our determination of likelihood of confusion under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (the “DuPont” factors) *cited in B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). In considering the evidence of record bearing on these factors, we keep in mind that “[t]he fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the ... [services] and differences in the marks.” *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

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<sup>6</sup> Definitions of “publish” and “magazine” from the MERRIAM-WEBSTER online dictionary. Examining Attorney’s Brief, 8 TTABVUE 10-11, 14-15, 18-19, 22.

We have considered each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). However, varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Moreover, “each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source, and to protect registrants from damage caused by registration of marks and goods or services that are likely to cause confusion. *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331 (1985); *see also Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566.

#### **A. Similarity or Dissimilarity of the Marks**

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant’s and Registrant’s marks in their entirety, considering their appearance, sound, meaning and commercial impression. *DuPont*, 177 USPQ at 567; *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1048 (Fed. Cir. 2018). “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) 1746 (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir.

2019). In this connection, by “commercial impression” we mean “what the probable impact will be on the ordinary purchaser in the market place ...” *T. W. Samuels Distillery, Inc. v. Schenley Distillers, Inc.*, 458 F.2d 1403, 173 USPQ 690, 691 (CCPA 1972).

Here, both Applicant’s mark and Registrant’s mark is the word STRIPES in standard characters. The marks “are literally identical, carry the same meaning, ... have the potential to be used ... in exactly the same manner[, and] would be perceived similarly.” *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015), *aff’d*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017). “Because the marks are identical, we conclude that they are likely to engender the same overall commercial impression.” *Id.* In its appeal brief, Applicant does not contest that its mark and the cited mark are identical.

Accordingly, the first *DuPont* factor, the identity between the marks, weighs heavily in favor of a finding that confusion is likely.

**B. The Similarity or Dissimilarity of the Respective Services, Channels of Trade and Prospective Consumers**

**1. Services**

We next turn to a comparison of the services at issue, the second *DuPont* factor, *DuPont*, 177 USPQ at 567. In making our determination regarding the similarity of the services, we must look to the services as identified in the appealed Application and cited Registration. *See Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 76 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (quoting *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“[T]he

question of registrability of an applicant's mark must be decided on the basis of the identification of ... [services] set forth in the application ... regardless of what the record may reveal as to the particular nature of an applicant's ... [services], the particular channels of trade or the class of purchasers to which the sales of ... [services] are directed."); see also *Paula Payne Prods. Co. v. Johnson Publ'g Co.*, 473 F.2d 901, 177 USPQ 76, 77 (CCPA 1973) ("Trademark cases involving the issue of likelihood of confusion must be decided on the basis of the respective descriptions of ... [services]."). "Moreover, because the marks are identical, the degree of similarity between the ... services required for confusion to be likely declines." *DeVivo v. Ortiz*, 2020 USPQ2d 10153, at \*11 (TTAB 2020) (citing *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015)).

Here, the services identified in the cited Registration are "publication of books, of magazines, of journals, of newspapers, of periodicals, of catalogs, of brochures; publication of electronic newspapers accessible via a global computer network." The Application identifies "entertainment services, namely, providing on-line interactive children's stories" as the services for which registration is sought. The Registration uses broad wording to describe the identified publication services, with no limitation on the type or content of matter published (unrestricted).

Registrant's publication services thus encompass the publication of all kinds of content, including interactive children's stories. Registrant's services also include the "publication of electronic newspapers accessible via a global computer network," again with no limitations on content. Thus, Registrant's online newspapers may

contain interactive children's stories, *See Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*44 (TTAB 2022) (finding that some of the goods identified in certain classes of the opposed applications were identical to, or (at the very least) are encompassed by, the goods identified in Opposer's registrations); *In re Solid State Design Inc.*, 125 USPQ2d 1409, 1412-15 (TTAB 2018) (finding the registrant's broadly described computer software to encompass the applicant's more specifically identified computer software).

When an applicant's services are fully encompassed within the wording of the cited registration, they are considered legally identical. *In re i.am.symbolic, llc*, 127 USPQ2d 1627, 1629 (TTAB 2018) (citing *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp., Inc.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981)). Applicant's recitation of services is fully encompassed within the wording of Registrant's recitation that broadly describes publication services.

Relatedness between the respective services can be found based on the descriptions in the application and registration without resort to additional evidence. *Hewlett-Packard Co. v. Packard Press, Inc.*, 281 F.3d 1261, 62 USPQ2d 1001, 1004 (Fed. Cir. 2002) ("While additional evidence, such as whether a single company sells the [services] ... of both ... [Applicant and Registrant], if presented, is relevant to a relatedness analysis ..., the important evidence already before [the Board comprises the identifications of services in] the ... application and [cited] registration[]"). Here, we have record evidence of dictionary definitions of the words

“publication” and “publish” which, contrary to Applicant’s contention, corroborates our finding of relatedness on the face on the respective identifications.

Applicant cites to the dictionary definition of “publication” as “the act or process of publishing” or “a published work,” as well as the examples listed in the definition of textual matter that is produced or released for distribution in a book, magazine, newspaper, etc.<sup>7</sup> From this definition, Applicant argues:

The [R]egistrant’s services facilitate the dissemination of creative work and literature by connecting with authors and preparing their works for release. It is the commercial production and issuance of literature, information, art, etc. Publication services involve entering into complicated business relationships that are governed by significant legal parameters – contracts, IP rights, etc. ... In contrast, Applicant’s entertainment services do not involve third party input or further stages. Applicant merely allows anyone with an Internet connection to access its interactive children’s entertainment. Applicant’s services, by definition, are different legally from the publication services as described in the Cited Registration. ... [Thus,] the conditions under which such publication services take place and the classes of consumers to whom the services are rendered are significantly different and sufficient to obviate the likelihood of confusion in this case.<sup>8</sup>

The Examining Attorney cites to the dictionary definition of “publish” as “to disseminate to the public,” which also includes “to produce or release for distribution.”<sup>9</sup> From this definition, the Examining Attorney responds:

From the rather minimal definition of the term publication, the applicant determines, without basis, that publishing comprises the narrow service of being the middle-man between authors and artists and the public, and ignores the existence of those publishing their own content, whether online or in print. Removing the unfounded

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<sup>7</sup> Definition of “publication” from the MERRIAM-WEBSTER online dictionary, with examples. Applicant’s Brief, 6 TTABVUE 14-15.

<sup>8</sup> Applicant’s Brief, 6 TTABVUE 8-9.

<sup>9</sup> Definition of “publish” from the MERRIAM-WEBSTER online dictionary. Examining Attorney’s Brief, 8 TTABVUE 10.

middle-man language, the applicant describes publishing as “the dissemination of creative work and literature”, which bears a noticeably strong resemblance to the applicant’s own identification of services - providing children’s stories.<sup>10</sup>

We agree with the Examining Attorney. Applicant’s arguments attempting to distinguish the respective services are not supported by the dictionary definitions or any other evidence of record.<sup>11</sup>

There is no record evidence that detracts from our finding that Applicant’s services are fully encompassed within the wording of the cited registration, and thus are legally identical. The legally identical nature of the respective services heavily weighs in favor of a finding that confusion is likely.

## **2. Channels of Trade and Potential Customers**

The third *DuPont* factor “considers [t]he similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (quoting *DuPont*, 177 USPQ at 567). The trade channels factor considers the modalities (e.g., print, media, store aisles or shelves, or online) by which the respective services are marketed, *see In re Majestic Distilling*, 65 USPQ2d at 1204, and whether the services are offered or rendered in relative

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<sup>10</sup> Examining Attorney’s Brief, 8 TTABVUE 5-6.

<sup>11</sup> Applicant further seeks to distinguish its services from Registrant’s services because Applicant’s identified services are “interactive” and Registrant’s services are not so identified. Applicant’s Reply Brief, 9 TTABVUE 4. This argument is not persuasive. [T]he ... [respective services] need not be identical or competitive, or even offered through the same channels of trade, to support a holding of likelihood of confusion. ... The issue ... is not whether purchasers would confuse the ... [services], but rather whether there is a likelihood of confusion as to the source of the ... [services].” *In re Cook Med. Techs. LLC*, 105 USPQ2d 1377, 1380 (TTAB 2012).

proximity, see *Kangol Ltd. v. Kangaroos U.S.A., Inc.*, 974 F.2d 161, 23 USPQ2d 1945, 1946 (Fed. Cir. 1992).

Where, as here, “the ... [services at issue are [legally] identical ..., absent restrictions in the application and registration, [the services] ... are presumed to travel in the same channels of trade to the same class of purchasers.” *In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012). The presumed overlap in trade channels and prospective customers, the third *DuPont* factor, weighs in favor of a finding that confusion is likely.

**C. The Conditions under which and Buyers to whom Sales are Made, i.e. “Impulse” v. Careful, Sophisticated Purchasing**

The fourth *DuPont* factor examines “the conditions under which and buyers to whom sales are made, i.e., ‘impulse vs. careful sophisticated purchasing.’” *DuPont*, 177 at 567. “Purchaser sophistication may tend to minimize the likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect.” *Palm Bay Imps.*, 73 USPQ2d at 1695 (citing *Recot*, 54 USPQ2d at 1899 (Fed. Cir. 2000)).

Our analysis under the fourth *DuPont* factor “must be based on the identification[s] of services in the cited Registration and subject Application, as that determines the scope of the benefit of registration.” *Sock It to Me, Inc. v. Fan*, 2020 USPQ2d 10611, at \*7 (TTAB 2020) (citing *Stone Lion*, 110 USPQ2d at 1162). Because there are no identified restrictions, Applicant’s and Registrant’s identifications of services “include[] all ... [services] of the type identified, without limitation as to their nature or price.” *Id.*, at \*8.

Applicant argues:

The services offered under the Cited Mark are offered to authors and artists, who in their own right are a type of sophisticated consumer. When the goods/services are the type that are purchased after careful consideration by sophisticated, informed and deliberative buyers, who are likely to have a full understanding of the source of the goods/services, and therefore are certain to exercise greater care in making purchasing decisions, the likelihood of confusion is further reduced.

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On the other hand, Applicant's services are provided to parents and their children. While this audience may not rise to the level of a sophisticated consumer, ... even in cases of a less sophisticated purchaser, an important decision – as choosing products for children is – will be made with thought and research.<sup>12</sup>

The Examining Attorney responds:

Applicant contends that the [A]pplicant's services are provided to the general public while the registrant's services are offered only to authors and artists. ... [However,] one of the key features of publishing is disseminating something to the public, thus, while publication services may on one side work with artists and authors, the primary facet of publishing is providing that publication to the [general] public.

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[A]pplicant acknowledges that their consumers do not rise to the level of sophisticated consumers, but contends that important decisions, such as choosing products for children, those decisions will be made with thought and research. ... Even if these consumers were considered sophisticated, the fact that purchasers are sophisticated or knowledgeable in a particular field does not necessarily mean that they are sophisticated or knowledgeable in the field of trademarks or immune from source confusion.<sup>13</sup>

We find the broadly worded recitation of services cover expensive as well as inexpensive publications, and there is no evidence of record to support a finding that the prospective consumers of the services are anything but ordinary purchasers

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<sup>12</sup> Applicant's Brief, 6 TTABVUE 9-10.

<sup>13</sup> Examining Attorney's Brief, 6 TTABVUE 7-8.

utilizing average care. As has often been stated, “[a]ttorney argument is no substitute for evidence.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (quoting *Enzo Biochem, Inc. v. Gen-Probe, Inc.*, 424 F.3d 1276, 76 USPQ2d 1616, 1622 (Fed. Cir. 2005)). Accordingly, we find the fourth *DuPont* factor neutral in our analysis of whether confusion is likely.

#### **D. Balancing the Likelihood of Confusion Factors**

Weighing the *DuPont* factors for which there has been evidence and argument in this appeal, *In re Charger Ventures LLC*, 65 F.4th 1375, 2023 USPQ2d 451, at \*7 (Fed. Cir. 2023) (“[I]t is important ... that the Board ... weigh the *DuPont* factors used in its analysis *and* explain the results of that weighing.”), we find that Applicant’s and Registrant’s marks are identical; the respective services are legally identical and presumed to travel in overlapping trade channels to the same classes of target consumers. The conditions under which, and buyers to whom, sales of the services are made are neutral considerations in our analysis.

We therefore find that Applicant’s mark, used in connection with Applicant’s services, so closely resembles Registrant’s mark as to be likely to cause confusion, mistake or deception as to the source of Applicant’s services.

#### **Decision**

The refusal to register Applicant’s STRIPES mark under Trademark Act Section 2(d) is affirmed.